IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.25 OF 2001

Shri Kailash Bhagat,
son of Ramashish Bhagat,
aged 24 years, resident of
Mohamadpur village, district
Sittamali, Bihar, presently
in custody at Central Jail,
Aguada, Goa ... APPELLANT

VERSUS

State (through Public
Prosecutor) ... RESPONDENT

Mr. S.G. Bhobe, Advocate for the Appellant.

Mr. A.P. Lawande, Public Prosecutor, for the Respondent.

CORAM : P.V. KAKADE,J.

DATED : OCTOBER 25, 2002.

ORAL JUDGMENT

The Appellant has preferred this Appeal against the Judgment and Order of conviction and sentence passed against him by the Special Judge, Mapusa in Special Criminal Case No.27 of 2000 wherein he was convicted and sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rupees One Lakh, in default to undergo another 6 months Simple Imprisonment under Section 20(b)(ii) of the NDPS Act.

2. The facts giving rise to the case in a

nutshell are thus:-

On 19-2-2000, at about 9.50 p.m., P.S.I. Rajesh Kumar attached to Calangute Police Station received a specific information that one person aged 24 years wearing blue colour full sleeve shirt and blue colour jean pant would be visiting Candolim near Nerul bridge to deliver consignment of charas to prospective customers, at about 10.45 p.m.. On receipt of the information, P.S.I. reduced it to writing and copy thereof was sent to S.D.P.O. Mapusa who is the Official Superior and thereafter arranged the panchas to conduct the raid.

The P.S.I. and other members of the raiding party including the panchas went to Candolim and kept themselves hidden in the bushes. The Dy. S.P. Gawas also joined the raiding party. At about 10.45 p.m. one person came from Candolim side and halted at the bridge. The information earlier received was tallied with the description of the said person and, therefore, he was surrounded and questioned about his name and antecedents, who disclosed that his name was Kailash Bhagat and he was from Bihar. The P.S.I. then informed him about the specific and reliable information received by him and told him that they wanted to search him for

drugs. He was apprised of his right contemplated in Section 50 of the N.D.P.S. Act giving the offer to be searched before the Gazetted Officer or before a Magistrate. However, he declined to do so. He also was given offer to search the members of the raiding party including the panchas but he declined that offer also. He was holding a plastic bag in his hand which was searched wherein the P.S.I. found 4 bundles of different sizes all containing black colour substance of cylindrical shape wrapped in transparent plastic cover, heat sealed but torn. It was suspected to be charas and it weighed 1.190 Kgs. It was packed and sealed and signatures of the panchas were taken on the sealed packet along with the P.S.I. and the accused. The accused was also having a waist pouch wherein he was having some of his personal belongings. A panchanama was drawn on the spot along with the seizure report. The accused/Appellant was given the grounds of his arrest and was taken into custody. The specimen seal letter was prepared and the attached bag was sent to the Chemical Analyser for analysis. On receiving the report of the Chemical Analyser, the charge-sheet was filed before the Special Court.

3. The Appellant/accused pleaded not guilty to the charge and claimed to be tried. The

defence of the accused was that of total denial of any criminal liability. The learned Special Judge proceeded to record the evidence which consisted of 6 witnesses who also have proved necessary documents on record. On the basis of the available evidence, the learned Special Judge came to the conclusion that the prosecution had succeeded in establishing the fact that the Appellant was found possessing the contraband articles and was guilty of the offence punishable under Section 20(b)(ii) of the N.D.P.S. Act 1985, and accordingly, passed Order of conviction and consequent sentence against him. Hence the Appeal.

I heard Mr. Bhobe, the learned Counsel for the Appellant and Mr. Lawande, the learned Public Prosecutor. I also scrutinized the entire evidence on record with their help and have also perused the Judgment of the lower Court.

4. At the outset, Mr. Bhobe vehemently urged that there was no proper compliance of the mandatory provision of Section 50 of the N.D.P.S. Act and there was no proper apprisal of right to the accused regarding the offer of his search to be taken before the Gazetted Officer or Magistrate. According to him, the Appellant is a Behari person

who did not know English language, but knew only Hindi language, however the P.S.I. who apprised the Appellant in this regard, used words such as "Gazetted Officer" and "Magistrate" and hence there was no proper apprisal of his right contemplated by the impugned provision. In order to meet this argument, my attention was invited to the evidence on record in this regard.

I may note that the prosecution has examined 3 witnesses on this point including the independent panch witness. P.W.3 Bhanudas, the panch witness, has stated that when the Appellant was surrounded by the P.S.I. and Dy. S.P. and other raiding party and was informed that they had received the information that he was possessing the charas, the Appellant was also holding white polythene bag and P.S.I. Rajesh Kumar told the Appellant that his search was required to be taken and if he wanted, he could bring a Gazetted Officer or a Magistrate for the purpose of search, but the Appellant declined the offer. In his cross-examination, the panch witness has categorically stated that the apprisal of the right of the Appellant in this regard was in Hindi language. Similar is the version of P.W.4, P.S.I. Rajesh Kumar, who has stated that he informed the

Appellant that he had right to be searched before a Gazetted Officer or a Magistrate of his choice but the Appellant declined to do so and thereafter search was made. P.W.5, Dy. S.P. Gawas, has also stated that the accused was given the offer that he had right to be searched before a Magistrate or a Gazetted Officer, but the accused declined to do so. In his cross-examination, P.S.I. Rajesh Kumar has repeated **ad verbatim** the words in Hindi which were used while the Appellant was apprised of his rights in this regard which is again corroborated by Dy.S.P. Gawas.

Therefore, in my considered view, there was not only substantial but total compliance with the mandatory provision of Section 50 of the N.D.P.S. Act and the Appellant cannot make any grievance whatsoever that he was prejudiced in any manner in this regard. Mr. Bhobe, the learned Counsel for the Appellant, submitted that the words "Magistrate" and "Gazetted Officer" were used which are English words and the Appellant was not in a position to know the English words and, therefore, there was no proper compliance with the provision of Section 50 of the N.D.P.S. Act. However, initially, we must note in this connection that there is no foundation laid on behalf of the defence

during the course of the trial to show that the Appellant did not know English language in general, and meaning of the words "Magistrate" or "Gazetted Officer" in particular. Moreover, the very fact that the Appellant declined the said offer to be searched by the concerned Authorities would show, by necessary implication, that he understood the meaning of both the said words. Otherwise, he would not have declined the offer by application of his mind to the meaning of the offer. It was also sought to be urged by Mr. Bhobe that there is no indication to show that the Appellant was apprised of his "right" and what was informed to him was in the nature of option given to him in this regard. However, I prefer to disagree with this proposition, especially when there is absolutely no necessity to use the word "right" at the time of the apprisal of the right, when the offer to be searched by the concerned Authorities is unequivocally expressed and consciously declined by the Appellant. In this regard, the ruling of the Apex Court in the case of **Joseph Fernandes v. State of Goa** (2000 CRI. L.J. 3485) requires to be noted. In that case, similar argument was advanced to the effect that the Searching Officer should have told the person who was subjected to search that he had right to be searched in the presence of Gazetted Officer or

Magistrate. In that case what the searching officer had informed was that she told the appellant that if he wished he could be searched in the presence of Gazetted Officer or Magistrate to which the appellant in that case did not favourably reciprocate. In this regard, the Supreme Court has held that the said offer is a communication about the information that the Appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in the mind unaided by the interpretation placed on it by the Constitutional Bench. Even then the searching officer informed him that "if you wish you may be searched in the presence of Gazetted Officer or a Magistrate". This, according to the Apex Court, was substantial compliance with the requirement of Section 50. In the present case before us, what is found on record is more than substantial compliance, but, in fact, is a total compliance with the provision of Section 50 of the N.D.P.S. Act and, therefore, the argument in that regard made on behalf of the Appellant cannot be accepted at all.

5. The second objection raised by Mr. Bhobe was with regard to the compliance of Section 42 of the N.D.P.S. Act. In this regard it was

urged that the information which was said to be recorded by P.S.I. Rajesh Kumar has never come on record, and what has been produced at Exhibit P.W.4/B is the copy of the said information and, therefore, there is no direct compliance with the provision of Section 42 of the said Act. in this regard, P.S.I. Rajesh Kumar has stated that he received the information at 9.50 p.m. and it was reduced to writing and copy was sent to S.D.P.O. In turn, P.W.5 Gawas, the Dy.S.P. & S.D.P.O. has stated that he received the information and on its receipt it was forwarded to the concerned Clerk for taking in despatch register to be noted in due course. Though he has admitted that he did not mention the timing of the intimation which he received at the said time, he did sign it before sending it to the despatch clerk. Now, Exhibit P.W.4/B is the copy of the information which is brought on record. In this regard, in the course of cross-examination, the Dy.S.P. has stated that if required, he could produce the document relating to the entry regarding intimation under Section 57 if so directed. The note made by the learned Special Judge also shows that the request of the defence was turned down by the Court and, therefore, it could not be produced. However, in my considered view, this aspect would not hamper or weaken the

prosecution case even for a moment when both the witnesses have testified to the facts that the information was received and it was refused to writing and was immediately forwarded to the superior Officer by P.S.I. Rajesh Kumar. Under the circumstances, mere bringing on record the copy of the information would not render the entire evidence false.

In fact, as is the prosecution case, the information was received at 9.50 p.m. to the effect that the Appellant was likely to go to the spot at 10.45 p.m. i.e. even within one hour. The Supreme Court in the case of **Sajan Abraham v. State of Kerala [(2001) 6 SCC** 692], has categorically held that when it was seen that the compliance with the requirement contemplated under Section 42, sub-sections (1) and (2) would have delayed the trapping of the accused which might have led to his escape, then under such circumstances there could not have been violation of Section 42 of the N.D.P.S. Act. In other words, when the time was short and the accused was likely to escape and the very purpose is likely to be frustrated of the entire arrangement of the raid after receipt of the information, then even non-preparation of the information in writing would not vitiate the trial.

In the present case before us, there is specific positive evidence on record that such information was reduced to writing and it was submitted to the superior Officer as contemplated under the relevant provision, which would show that there was sufficient compliance with Section 42 of the said Act and hence the arguments in that regard made on behalf of the Appellant are devoid of any merits.

6. The third and last submission made on behalf of the Appellant was expression of doubts in respect of process of sealing of the contraband and consequent forwarding those to the Chemical Analyser. Mr. Bhobe, the learned Counsel for the Appellant submitted that the evidence on record was sufficient to create suspicion with regard to the entire process of sealing and subsequent forwarding the said contraband to the Chemical Analyser and hence the evidence in that regard cannot be believed. He has brought to my notice the deposition in cross-examination made by P.W.6 Sakharam Sagun Naik, Head Constable as well as Store Room Keeper of Calangute Police Station. He has stated in his cross-examination that after receipt of the sample packet, the P.S.I. took one envelope on 21-2-2000. On the basis of this solitary statement the learned Counsel for the Appellant

tried to build a castle in order to create doubt regarding the entire process of sealing and forwarding of the sample. However, it must be noted in this regard that the contraband articles were sealed in proper manner on the spot of the seizure which can be seen from the evidence of P.W.4 Rajesh Kumar. According to him, the substance was put in a white polythene bag, heat sealed and put in an envelope of khaki colour and then packed and sealed. The seal was of the inscription of Calangute Police Station with Ashoka emblem. The relevant particulars were written on the envelope and thereafter those were signed by him and panchas. Moreover, signature of the accused was also taken thereon. According to him, he kept the property with the Officer-in-charge with a letter which bore his signature at point 'X' and marked as Exhibit P.W.4/C. The seal was also handed over to the Officer-in-charge. Thereafter he gave information to the S.D.P.O. He has further identified the specimen seal letter which was prepared on the spot which is which is Exhibit P.W.4/B which bore his signature. It is significant to note that after the seal was handed over by P.S.I. Rajesh Kumar to the P.I. i.e. in proper custody, thereafter the seal was not moved again from the custody of the P.I. There is absolutely no evidence in that regard and,

therefore, there cannot be any doubt whatsoever regarding the authenticity of the seal as well as of the sealed envelopes which were carried to the Forensic Laboratory in due course. In this regard, P.W.4 Rajesh Kumar was asked certain questions by the Court itself and it has come on record that when seal was taken by P.S.I. Rajesh Kumar from the custody of P.I. for the purpose of taking specimen seal, the sealed packets were with the Officer-in-charge of the Police Station, P.I. Goltekar. He has further stated that the attached packets which were sealed were in his custody till he reached the Police Station when those were handed over to the P.I., which aspect shows that there was absolutely no scope for the P.S.I. Rajesh Kumar to tamper with the seal of the contraband articles at any given moment. Mr. Bhobe, the learned Counsel for the Appellant, sought to put reliance on a catena of decisions of this Court as well as other Courts in order to put emphasis on the importance of this aspect. In that regard, I must note that there cannot be any two opinions regarding the utmost care which is to be taken with sealing and specimen seal letters and samples taken and sealed before those are forwarded to the Forensic laboratory. However, in the present case before us I am totally satisfied that the P.S.I. or the investigating machinery at

large had no opportunity whatsoever to tamper with it and therefore the argument in that regard has to be discarded in toto.

7. Therefore, having considered all material aspects and facets of the evidence on record, I have no doubt whatsoever that the Appellant has committed the crime for which he is convicted and sentenced. In view of this position, I fully concur with the findings recorded by the learned Special Judge and see no reason to interfere with the Order of conviction and sentence passed against the Appellant by the lower Court.

8. In the result, the Appeal stands dismissed. The Appellant is in Jail and shall undergo the sentence as per law.

P.V. KAKADE,J.

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